Law Text Culture

Volume 4 *Issue 1 In the Wake of Terra Nullius* Article 7

1998

Indigenous peoples, identity, history, and law: the United States and Australian experience

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Abstract

Approximately 350 million people in the world, or roughly 6% of the world's population are indigenous. Significantly diverse, Native peoples live in at least 72 countries as nations within nations (Echo-Hawk 1997: 1_2). Indigenous peoples existed before colonists arrived in their homelands, and yet the conquerors have consistently sought to develop legal standards of indigenous identity. In every instance, identity is related to land rights, cultural freedoms, and sovereignty issues. What is an indigenous person's legal identity? A people's identity? How is it determined? Who determines it? Such simple questions have so often generated complex and confusing answers.

Indigenous Peoples, Identity, History, and Law: The United States and Australian Experience

John R. Wunder

Approximately 350 million people in the world, or roughly 6% of the world's population are indigenous. Significantly diverse, Native peoples live in at least 72 countries as nations within nations (Echo-Hawk 1997: 1-2).[0] Indigenous peoples existed before colonists arrived in their homelands, and yet the conquerors have consistently sought to develop legal standards of indigenous identity. In every instance, identity is related to land rights, cultural freedoms, and sovereignty issues. What is an indigenous person's legal identity? A people's identity? How is it determined? Who determines it? Such simple questions have so often generated complex and confusing answers. It is in oral traditions and texts, both literary and legal, where reflections of culture and identity are stored and clues to unraveling legal understanding can be found. However, such analysis is not easy achieved, since 'determining the indeterminable,'[1] the process of constructing indigenous identities through law, almost always occurs within a colonial legal context without the benefit of indigenous law incorporation. Some nations, such as the United States, have devoted considerable legal time and energy seeking to substantiate indigenous identities. Others, such as Australia, are just beginning this process as the *Mabo v Queensland* (1992) decision demonstrates.

Native peoples in today's world, living in non-dominant positions, retain distinct cultural self-identities. They have different aspirations from the dominant society as fundamental to indigenous existence is cultural self-determination and territorial sovereignty.[2] As Danish scholar Jens Dahl has

noted, identity is seen in indigenous self-determination acts, and the right to an identity is 'anchored to the right of self-determination' (1996: 17). Self-determination for indigenous peoples, according to Dahl, involves two very important concepts: '[S]elf-determination is first of all an act of cultural identity and secondly a right to be claimed within national and international law.'

Munganye (1988/89: 76-77) ponders his individual Aboriginal identity, but it might as well be that of all indigenous peoples. He published the following poem, 'Black and White,' in a special issue devoted to writings from Australia in *Prairie Schooner,*[3] an American literary journal:

What color my soul, heh?
What color you think it?
Black like cockatoo?
See 'im/ - that one there
on old man Gum.
His feathers move in wind
like many ants
on burnt wood.
That cockatoo, he sure be black!
You think that black
like my soul?

What color my soul?
Ask your preacher man.
See what he say.

Is it black like shadow?
Look at shade on ground.
It not so black, I think.
Not black like cockatoo.

That preacher man!
My soul be white, he say?
Pretty damn silly,
white soul in black body
What so good about white?
You tell me that!

When I sleep, with shut eye,
I dream no color.
Not black, not white,
not nothing.

You think that dream my soul?
You think my soul no color
like water in billabong?
- Maybe.

Maybe not.

What color an indigenous soul? Ask your lawyer? Your judge? Your legislator? That's just what has happened and is happening throughout the world, and especially in the United States.

Historical Preludes to Defining Native American Identities

In the United States, two forms of indigenous identity are defined by law: that of *individual* tribal members and that of *collective* tribal status. Prior to conquest, membership in Native American nations was determined by informal and formal cultural practices within the nations themselves. This changed after conquest. Since the Indian Reorganization Act of 1934, individual tribal affiliation has been prescribed by tribal governments with the assistance of federal administrative guidelines.[4] All tribal governments define tribal membership through tribal law and interpretation of that law within tribal bureaucracies and tribal courts.

Collective indigenous recognition as tribal identity in the United States is a more complex matter. Prior to 1871, recognition at the federal level came in the treaty-making process. Those Indian nations who signed treaties first with the sovereign states shortly after the American Revolution and then with the United States government were recognised as tribal entities. After the abolition of its own treaty-making powers with indigenous peoples in 1871, the federal government was uncertain as to how to proceed. (*Resolution of 1871;* see also Wunder 1985). Congress, the federal courts, and the Executive branch bureaucracy competed to determine how best to define indigenous collective identity with most of this competition occurring during the past thirty years.

Definitions of recognition are very important. They are necessary in order to qualify for federal programs, special legal opportunities for tribes, and the reclamation of tribal rights to land and sovereignty. In the United States, without recognition an Indian nation cannot reach the various levels of self-determination that are so essential in the struggle for the ultimate goal of full sovereignty.

Since World War II, Native American nations in the United States have experienced a number of significant legal events. Beginning in 1946, the Indian Claims Commission [ICC] was founded. This federal tribunal

investigated Indian claims related to land confiscations and violations of treaties, and the ICC made determinations of financial restitution. The intent of the ICC was to complete, once and for all, investigations of treaty wrong-doing and to provide funds that would make tribal status no longer necessary. This, of course, would not be accomplished, but it required the federal government to recognise tribes in order for them to make claims.

Probably the most important by-product of the Indian Claims Commission was the discovery of numerous groups of tribes within the United States who were not officially recognised by the federal government and who did not have specific treaty relationships with the United States. This occurred because the enabling legislation creating the ICC made it very easy for any Indian group, recognised or unrecognised, to file a claim. Once a claim was filed, it was only a matter of time before the ICC or the courts faced the issue of whether or not the group was a tribal nation. Ironically, the ICC, purposely created to assist in the abolition of tribes, instead increased the number of tribes defined under federal law (Weatherhead 1980; Quinn 1990). Federal recognition of tribal entities continued after the conclusion of the ICC in 1978 with the establishment of a new bureaucracy in the Department of Interior, the Branch of Federal Acknowledgment and Research.

The ICC was created as a part of the termination movement. Many Americans came to believe that Indians as sovereign nations should not exist, and so they developed federal programs designed to 'liquidate' Native American collective identities. Known as 'termination,' federal actions in the 1950s and 1960s under the watch of Presidents Dwight Eisenhower and John Kennedy resulted in laws signed abolishing 109 tribes and bands composed of 11,500 individuals and their loss of over 1.3 million acres of land. The most well-known of the tribes terminated was the Menominees of Wisconsin (Wilkinson & Biggs 1977: 151).[5]

In addition to termination, Congress passed *Public Law 280* in 1953 and adopted the Relocation program for young reservation Indians. *Public Law 280* took away criminal and civil jurisdiction on Indian reservations from

Indian governments and gave it to state governments in six states and provided for ways other states could assume jurisdiction. This was, according to several scholars, the most aggressive abolition of Indian sovereignty rights yet proposed in the United States (Wunder 1994: 107-11; Goldberg 1975). The Relocation program was designed to take young Indians from reservations and deposit them in cities far from their reservations - a twentieth-century form of Indian removal policy. Indian ghettos emerged in Dallas, Minneapolis, Cleveland, and Los Angeles. It was a particularly coercive and disruptive policy that placed great pressure on individual Indian identities as well as state and local welfare agencies (Fixico 1986: 148-69, 183-5; Harmer 1956; Wunder 1994: 105-7). Thus, the intersection of Native Americans with federal law through such concepts as termination, *Public Law 280*, and relocation programs, caused many Indian nations to realize that they were in a struggle to retain their basic identity.

Two legal forms of collective indigenous identity emerged in the United States in the 1970s. They are termed *recognition* and *restoration*. *Recognition* is the formal means by which the United States officially acknowledges the existence of a Native American group or tribe. It is analogous to the official standing foreign nations have with the United States government. Recognition of Native American nations usually means that federal programs are extended to the members of the recognised entity. Recognition can be achieved through an act of Congress, an executive order, or a judicial determination.

Restoration is the process a tribe must go through in order to be recognised after it has been terminated. It is a direct response to the termination acts passed for specific tribes in the 1950s and 1960s. This designation comes only from Congress. During the 1970s through the 1990s recognition and restoration movements have been very active.

Recognition and Restoration

Prior to the 1970s recognition was not a controversial concept because it had rarely been implemented. Congress had not determined what a tribe was, and the federal courts had not clarified the situation. The Department of Interior recognised tribes only on a haphazard case-by-case basis. This all changed because of the pressures caused by the large number of filings by Indian groups to the ICC and a 1974 Supreme Court case, *Morton v. Mancari.*

In this case, non-Indian employees of the BIA brought a class action against the Department of Interior over regulations and federal statutes that gave Indians preference for BIA job openings. It was a direct challenge to a new Indian self-determination policy being framed in a piecemeal fashion by then President Richard Nixon and Congress. The high court upheld the policy of Indian self-determination and declared that 'tribes' was a political, not a racial, classification. The effect of this decision on recognition issues was to assure groups of Indians who intermarried with other racial groups that they were not in danger of having their mixed blood status used against them. Thus, under American law 'tribe' was not synonymous with race.

A second court case caused a rash of interest in recognition legal issues. In some ways comparable to the *Mabo* decision which cites this case, *Joint Tribal Council of the Passamaquoddy Tribe v. Morton* (1975) was decided by the First Circuit Court of Appeals· The Passamaquoddys, or the Pestemohkatiyek as they call themselves[6], have lived in Maine for at least 3,000 years. Their relationship with the United States began with a treaty of alliance during the American Revolution in 1777. Even so the American patriots were suspicious of the Passamaquoddys and not very reliable allies. John Allan, General George Washington's agent on the eastern frontier, described the Passamaquoddys and their Maliseet relatives in 1783:

> These Indians, particularly the St. John's [Maliseets] and Passamaquoddy are very tenacious of their liberties; delagacious and subtle people and may be very dangerous if not attended to; their zeal in the cause and their virtue in persevering through many difficulties throughout the war with the attachments and affections the subscriber [Washington] has experienced himself commands his attention as well (Walker Buesing & Conkling 1980: 44).

Although they fought against the British, the Passamaquoddys were not invited by the Americans to the Treaty of Paris negotiations. Instead, their condition after the American Revolution necessitated making a 1794 treaty with the state of Massachusetts (Maine was then a part of Massachusetts) wherein the Passamaquoddys ceded most of their St. Croix River basin land rights in return for two reservations on the Canadian border encompassing approximately 27,000 acres. For nearly 200 years the Passamaquoddys watched the state of Maine, in Passamaquoddy the Kewok - a terrible formless being with an icy heart (Fewkes 1890) - summarily take almost 40% of their reservation lands without compensation or even consultation (see Brodeur 1982; also Paterson and Roseman 1979; and O'Toole and Tureen 1971).

In the 1970s the Passamaquoddys decided to sue for their lands because of an old federal law, the Indian Trade and Intercourse Act of 1790, which prohibited the sale or taking of Indian lands without a public treaty with the United States. The Passamaquoddys, like all Aborigines and Torres Strait Islanders and the Australian federal government, had never signed a treaty with the United States to cede their land claims. They argued that the treaty with Massachusetts and the subsequent actions by the state of Maine were in essence void.

Maine responded. It contended that the Passamaquoddys were not recognised by the United States as an Indian tribe, and the state pointed to an 1892 Maine state supreme court decision, *State v. Newell*, that the Passamaquoddys were not a tribe. This was in the face of two reservations and 1300 Passamaquoddys, 800 of whom lived on the reservations.

The First Circuit judges ruled that the Passamaquoddys were indeed a tribe and therefore entitled to the trust benefits and protections under the United States. In reaching this conclusion, the appellate court considered two issues: first, whether the tribe was racially and culturally in tact, and second, whether a community of Indians dealt with federal, state, or local governments over time. In both cases, the Passamaquoddys passed scrutiny. What this all meant was that the *Indian Trade and Intercourse Act* of 1790 prevailed, and that title to most of the land in Maine was theoretically yet to be extinguished from Maine's Indians (*Joint Tribal Council* 1975: 376-381).

Congress quickly got into the act. The Passamaquoddys agreed not to press claims for occupied lands, but they wanted cash and unoccupied lands. The Maine *Indian Claims Settlement Act* was passed by Congress in October 10, 1980, and signed by President Jimmy Carter. The statute set up a $27 million trust fund and a land acquisitions fund of over $54 million for the Passamaquoddys and their neighbors, the Penobscots and the Houlton Band of Maliseets. Each has subsequently purchased lands in Maine with the funds. The settlement of the Passamaquoddys opened the door to other Indian groups, many from New England and the American South, and all of whom had not signed treaties with the federal government. Most had signed agreements with states and were not federally recognised. Most, but not all, were successful in obtaining recognition and claims settlements (see *Schaghticoke Tribe v. Kent School Corp.*, 423 F Supp 780 (1976); *Mohegan Tribe v. Connecticut,* 638 F2d 612 (1980); *Narragansett Tribe v. Southern Rhode Island Land Development Corp.*, 418 F Supp 798 (1976); and Wallace 1982).

A different court ordered the Department of Interior to make administrative law. After the *Passamaquoddy* decision, the Department received nearly 40 new petitions for recognition. It decided to ignore the requests. One tribe caught in this delay was the Stillaguamish nation of the Pacific Northwest, and they went to court. The federal court in the District of Columbia ordered the Department of the Interior to make a decision on

the tribe's petition within 30 days (Quinn 1990: 363). This forced the executive branch to draft guidelines for the determination of recognition.

The Department issued temporary administrative regulations in 1978 and permanent regulations in 1980. They acknowledged that the large number of petitions from Native Americans forced them to issue recognition regulations (U.S., *Federal Register* 43(June 1, 1978): 23743-46.) In its 'Procedures for Establishing that an American Indian Group Exists as an Indian Tribe' (1980), three requirements had to be met by an Indian group for it to be recognised as a tribe. First, the petitioners needed to be ethnically and culturally identifiable in a general fashion. There were no specific racial requirements. This allowed for acculturation and intermarriage. Second, the group was required to have lived in 'a substantially continuous tribal existence.' This allowed for a brief lapse in tribal identification. And third, the group must have acted autonomously from the colonial era to the present. The Department was also forced to publish a list of all recognised tribes, and it did so (U.S., *Federal Register* 45(April 24, 1980): 27828-30).

There were weaknesses in the recognition regulations. All three requirements had to be met for a tribal group to become a recognised tribe, and autonomy, one of them, is not easily defined. Pre-industrial societies that created states limited their activities. While their agendas were much the same as today, it 'was understood in a minimalist rather than a maximalist vein; the state did a little and the subjects did the rest' (Crone 1989: 47). More often than not, indigenous states are evaluated by legal institutions in maximalist autonomy terms.

Three other problems have surfaced. Unlike Australia, the regulations only applied to the continental United States, so Native Hawaiians were left out. Also significant was the limitation placed on the dynamics of tribal political development. No 'splinter groups, political factions, communities or groups of any character which separate from the main body of a tribe currently acknowledged as being an Indian tribe by the Department . . .' can gain recognition 'unless it can be clearly established that the group has

functioned throughout history until the present as an autonomous Indian tribal entity.' (*US Code of Federal Regulations* 1980, s 54, 25). This provision locked tribes into a static political stage of development and did not allow for the past mistakes of the federal government, such as when separate tribes, sometimes national enemies, were forced to live on a common reservation and participate under a government scheme not sanctioned by one or more of the tribes. One last limitation prevented the Department of Interior from assisting with the research of an Indian group seeking recognition.

Although these provisions may seem onerous, they turned out to be more flexible than those adopted by federal courts making recognition decisions after 1978. One court that did not accord recognition easily was on the western coast. The Duwamish, Samish, Snohomish, Snoqualmie, and Steilacoom tribes signed treaties with the United States in what became the state of Washington, but because of population movement on and off reservations that were not monitored, urbanisation in their regions, and the effects of assimilation, the descendants to the treaty signings were not recognised when they wished to assert their fishing and hunting rights against state regulations. In *United States v. Washington* (1979), the Pacific Northwest Indians' claims were denied because the federal court determined none of the tribes were acting as tribes at the time of the law suit. The court reasoned that the Indians (1) did not live continuously in separate, distinct and cohesive Indian cultural or political communities; (2) did not exercise sovereignty over their members or any territory; and (3) did not maintain organised tribal political structures. Even though cultural and political fragmentation of these tribes were caused by nineteenth-century federal assimilation policies and twentieth-century failures of federal programs to protect the land base, the court tautologically reasoned its way out of recognition.

Another group who was deterred were the Mashpees of Massachusetts. Like the Passamaquoddys they sought relief through the courts, but their timing was not in their best interests. They currently live near Mashpee,

Massachusetts, and have resided in this region prior to European migration. At the federal district court level, the Mashpees lost in a jury trial when the jury was asked to determine if the tribe ever ceased to be a tribe over the course of approximately 200 years. The answer by the jury was 'yes,' on at least five occasions, and consequently the Mashpees were not defined as a tribe.

On appeal, the Mashpees sought tribal designation, but the First Circuit ruled against them. In so doing, the court stated in *Mashpee Tribe v. New Seabury Corp. et al* (1979) that there was a four-part test that needed to be met in order for the Mashpees to be recognised. (1) They were required to be of the same or similar race; (2) they must have been united in a community throughout time; (3) they were governed by continuous leadership and one government; and (4) they inhabited a defined territory. The Mashpees contended that the united community and government-leadership requirements were not fair because of federal and state interference with their tribe, but the court ruled against them on all four provisions. In both the Pacific Northwest and Massachusetts situations, courts decided to ignore the new federal regulations and issue their own opinions that were much more narrow and restrictive. The message seemed to be that after 1978 if Indian groups denied rights through recognition sought relief they needed to turn to the executive and legislative branches rather than the judiciary.

Maurice Kenny, a New York Iroquois, whose relatives fought the Mashpees before the American Revolution and whose tribe's recognition was not questioned after the Revolution, could feel the sense of threat to his indigenous identity in his poem, 'They Tell Me I am Lost' (1991: 68-70).

my feet are elms, roots in the earth
my heart is the hawk
my thought the arrow that rides
the wind across the valley
my spirit eats with eagles on the mountain crag
and clashes with the thunder
the grass is the breath of my flesh
and the deer is the bone of my child
my toes dance on the drum
in the light of the eyes of the old turtle

my chant is the wind
my chant is the muskrat
my chant is the seed
my chant is the tadpole
my chant is the grandfather
and his many grandchildren

...

although I hide in the thick forest
or the deep pool of the slow river
though I hide in a shack, a prison
though I hide in a word, a law
though I hide in a glass of beer
or high on steel girders over the city
or in the slums of that city
though I hide in a mallard feather
or the petals of the milkwort
or a story told by my father
though there are eyes that do not see me
and ears that do not hear my drum
or hands that do not feel my wind
and tongues which do not taste my blood..

I am the shadow on the field
the rain on the rock
the snow on the limb
the footprint on the water
the vetch on the grave
I am the sweat on the boy
the smile on the woman
the pain on the man

...

I am the sun and the moon
the light and the dark
I am the shadow on the field.

I am the string, the bow and the arrow.

Restoration also required executive and legislative attention, and its evolution constructively ended termination without Congress having to be placed on record as having made a fundamental error. Tribes terminated were de-recognised in their individual termination acts, and they were prevented from applying for recognition by the 1980 Department of Interior recognition regulations (U.S., 'Procedures for Establishing an Indian Tribe,' Section 54.7(g), 202; Walch 1983: 1188-89). Termination did not necessarily mean, however, the loss of treaty rights. The United States Supreme Court in *Menominee Tribe of Indians v. United States* (1968) ruled that the Menominees still had their treaty fishing and hunting rights even though they had been terminated.[7]

The first tribe terminated, the Menominees of Wisconsin in 1954, was also the first restored in 1973 .(U.S., *Menominee Restoration Act*, *Statutes at Large* 87(December 22, 1973): 770-73). Termination was extremely destructive to the Menominees. They lost vast amounts of land, trust funds, health care, employment, and education benefits (Herzberg 1978: 170-86). Congress and the President attempted to stop the damage of de-

recognition on the Menominees with the adoption in December 1973 of the Menominee Restoration Act (Oestreich 1972: 266-70).

The act's language was blunt. It specifically repealed the *Menominee Termination Act* of 1954. It emphasised that no treaty rights were altered, including fishing and hunting rights. The United States Supreme Court had already assured the Menominees of this, but Congress reinforced the guarantee. A Menominee Restoration Committee was placed in charge of the Menominees until their tribal government could be reactivated, and the membership roll, previously closed, reopened. The *Menominee Restoration Act* recognised the Menominees as a tribe once again, and it returned to the Menominees a number of former rights they had lost, although the act did not provide for the return of lost reservation lands or reimburse the tribe for its lost trust funds (U.S., *Menominee Restoration Act*: 770-73).

After the Menominee Restoration Act was passed, Congress adopted six criteria other terminated tribes needed to meet in order to successfully regain recognition. All six had to be met for a tribe to be restored.

First, terminated tribal members or their ancestors needed to gather in an identifiable community; and second, the community must be located near the former reservation. To satisfy these requirements, a tribe essentially demonstrated its tremendous resistance to termination. Third, a self-governing organisation needs to be functioning for the tribe; and fourth, the tribe had to demonstrate that its language and culture were being practiced. Tribes wanting to qualify for these two criteria set up committees and held powwows. They reinforced the education of their young in the ways of the tribe. Tribes were essentially made to be in a preparatory stage to assume tribal status by conforming to these two criteria. Fifth, restoration could be granted if tribes proved their socio-economic conditions deteriorated after termination, and sixth, tribes had to show they were poorer than their non-Indian rural neighbors.

These last two criteria were simply the ratification of the obvious. Even so, they were the most expensive of the criteria to prove. Consultants had to be hired by the terminated tribes to survey their members to obtain the information needed. As in the recognition process and with termination itself, the BIA refused to help the terminated tribes. No financial assistance was made available (Knoche 1990: 89).

With the restoration criteria clearly articulated, terminated tribes started at once to regain their rights and recognition. Most of the 109 tribes previously terminated have been restored. Each restoration has been unique and has required a specific act of Congress (Knoche 1990: 79-82, 98-9).

Comparative Collective Identity Regulations

The story of how the United States developed recognition and restoration procedures is a complex one that is not easily reconstructed. Nevertheless, we can discern some trends by comparing the requirements for official identification of indigenous nations by the executive, legislative, and judicial branches of the federal government.

From Table I, six categories emerge. Three involve racial, cultural, and temporal continuity. Some legalists insist that the members of a tribe have similar racial characteristics. This is a particularly difficult standard to meet for those tribes in the eastern United States and those tribes located in or near urban areas where racial intermarriage has occurred over time. It flies in the face of the American immigrant tradition.

Similarly, legalists believe that a cohesive cultural continuity is essential for recognition. While this is not often clearly defined, cultural continuity in the United States is generally described by looking at language and social practices that are distinctive.

An indigenous group wishing to achieve a sanctioned identity in the United States requires proof that the nation has existed continuously over time. Temporal continuity is applied to culture, community, and governance. Some legalists have strict concerns about a tribe's failure to retain their culture or community or political leadership since European and African contact, even though for over a two hundred-year period significant outside interference has occurred with tribal abilities to retain continuous relationships.

Three other traits involve geo-political issues. Indigenous peoples are to be residing in identifiable communities. They are to be governed by traditional leadership and exhibit some autonomy. They are to maintain political structures, and they are to inhabit a traditionally defined territory. All of these requirements are very difficult to meet because of previous federal policies that redefined Native homelands and political structures through warfare, Indian removal, assimilation, land confiscation, lack of treaty enforcement, imposed governments, and termination, among others. However, if a tribe has managed to persevere against all odds and still retain a community, political structures, and a sense of a defined territory, it can meet these recognition standards.

Table I

Legal Standards for the Recognition and Restoration of Indigenous Collective Identities in the United States

Required Identification Traits

Legal Documents	*Race*	*Culture*	*Time*	*Comm^{y}*	*Govt*	*Terr^{y}*
1974 Restoration Congressional Requirements		X	X	X	X	X
1975 *Passamaquoddy* Decision	X	X	X	X	X	
1979 *Mashpee* Decision	X		X	X	X	X
1979 *Washington* Decision		X	X	X	X	X
1980 Executive Recognition Regulations		X	X	X	X	

It is important to note that the frequent considerations of legal identity for Native Americans during the 1970s did not occur in a historical vacuum but at a time of significant Native American legal action, at the federal, state, and tribal levels. One of the most important events involved the settlement of land claims by the non-treaty indigenous peoples of Alaska through the Alaska Native Claims Settlement Act of 1971 (U.S., *Statutes at Large* 92 (December 18, 1971): 688-715). This statute overcame the disastrous Supreme Court decision of *Tee-Hit-Ton Indians v. United States* (1955) which held that Indians without treaties were not entitled to the protections of the Fifth Amendment that prevented the taking of land without just compensation (Wunder 1985: 115-8). The decade concluded with the passage of the American Indian Religious Freedom Act of 1978 (U.S., *Statutes at Large* 92 (August 11, 1978): 469-70) and the Indian Child Welfare Act of 1978 (U.S., *Statutes at Large* 92 (November 8, 1978): 3069-78).

Note also the evolution of policy. Racial requirements were made by only two appellate court decisions whose judges did not feel bound by the U.S. Supreme Court's *Morton v. Mancari* (1974) decision that ruled out racial classifications for indigenous Americans. The *Passamaquoddy* decision required the tribe to be racially and culturally in tact, but that was an inconsequential requirement given that the Passamaquoddys had lived on their isolated northern Maine reservations in their traditional homelands for centuries. Only in *Mashpee* did the court use a requirement of a same or similar race for judgment, and most today believe that the *Mashpee* decision was an anomaly, in other words, bad law. The Mashpees had intermarried with African Americans and European Americans for several hundred years.

By 1980, with the adoption of federal recognition regulations, the categories had been made more flexible. One needed to be culturally identifiable which could be interpreted in a variety of ways, have a ***substantially*** continuous tribal existence thereby allowing for limited breaks in continuity, and act autonomously since the beginning of the

British colonial period maintaining *some* aspects of sovereignty. While these regulations made for a more rational use of historical evidence in recognition determinations, it also allowed for greater flexibility of interpretation and consequently the political nature of subsequent presidential administrations has inevitably had an impact.

Mabo v. Queensland *(1992): International Comparative Perspectives*

Subsequent to the announcement of the Australia High Court's most important Aboriginal land claims case decision, *Mabo v. Queensland (No. 2),* a popular Australian rock group named Midnight Oil released a successful album, *Diesel and Dust*, dedicated to the recognition of Aboriginal land rights (1988). The lyrics of one of those songs, 'Warakurna,' set a tone for the *Mabo* decision and subsequent Australian federal legislation and court actions:

> There is enough for everyone
> in Redfern as there is in Alice.
> This is not the Buckingham Palace.
> This is the crown land,
> this is the brown land,
> this is not our land.
>
> Some folks live in water tanks;
> some folks live in red brick flats.
>
> There is enough, the law is carved in granite.
> It's been shaped by wind and rain.
> White law could be wrong,
> black law must be strong.

Warakurna, cars will roll.
Don't drink by the water hole.
Court fines on the shopfront mall.
Beat the grog and save your soul.

Some people laugh, some never learn;
this land must change or land must burn.
Some people sleep, some people yearn;
this land must change or land will burn

Diesel and dust is what we breathe.
This land don't change, this land must lie.
Some people leave, always return;
this land must change or land must burn.

The *Mabo* case has been compared to *Worcester v. Georgia* (1832) and *Cherokee Nation v. State of Georgia* (1831) in American legal history by legal historians who perceive the cases showing how the United States and Australia sought to consider the place of indigenous populations within their legal structures. *Mabo* involves the Meriam people's attempt to gain title to lands in their ancient homelands on the Murray Islands. While on the surface this dispute appears to be one involving land claims, it in many ways yet to be considered by legal scholars is basically a question of recognition and collective identity.

The High Court of Australia ruled that the Meriam people did indeed have rights to the Murray Islands against the world with the exception of lands leased to the Australian Board of Missions and the Australian federal government (*Mabo* 1992: 80). In the process of reaching this conclusion, the Court sought to explore common law aspects of land ownership which required an assessment of recognition concepts.

The Meriam people, the Court found, occupied the Murray Islands before European contact and have continuously resided there to the present. There has been no permanent immigration population of non-Meriams to the islands. As a question of fact, the Court concluded that the Meriam

people retain a 'strong sense of affiliation' with their past relatives and past culture, defined as related to 'laws and customs,' and most importantly with their homelands (*Mabo* 1992: 62).[8] Thus, for an Aboriginal nation to have standing to assert land rights under Australian law, it must remain an identifiable community practicing its traditional laws and customs and be in its 'home country' (*Mabo* 1992: 71).

Several aspects are striking in their contrast to American jurisprudence on these issues. First, there is significant attention to the idea that indigenous peoples must continue to live under their own laws and, in this particular instance their land law takes precedence. Crucial to collective identity is the usage of traditional laws to settle disputes. American courts and legislatures have not considered ties to the land as important requirements for recognition.[9] When culture is discussed, culture is perceived by American definitions in a broader social context rather than a political and legal context.

Second, although little attention is given to individual indigenous identity by Australia's High Court, it does define who may be considered Aboriginal in order to establish who has standing to bring a suit for land claims. 'Membership of the Indigenous people', states the Court, 'depends on biological descent from the Indigenous people and on mutual recognition of a particular person's membership by that person and by the elders or other persons enjoying traditional authority among those people' (*Mabo* 1992: 77).[10] Race and migration are understated aspects of this definition. Biological descent allows for racial and cultural intermarriage, but leaving one's people may mean that elders no longer recognise membership and perhaps more importantly a biological descendent may have forfeited recognition of Aborigine traditional authority. This Australian individual identity definition is significantly different from American requirements of tribal lists, blood quantum determinations, tribal government laws, and scrutiny of membership by non-Indian courts and agencies. To vest the power of identity in a people's elders is unheard of in the United States unless a tribe traditionally and informally consults with tribal elders.[11]

Third, the High Court articulates a 'skeleton of principle' to be binding in cases involving Aboriginal law (*Mabo* 1992: 65). What is meant is that 'no case can command unquestioning adherence if the rule it expresses seriously offends the values of justice and human rights (especially equality before the law) which are aspirations of the contemporary Australian legal system.' (*Mabo* 1992: 65) Judicial notice is taken by the High Court of its common law and British Commonwealth past. 'Although our law is a prisoner of its history', reflects the Court, 'it is not now bound by decisions of courts in the hierarchy of an empire' (*Mabo* 1992: 64). This is a significant admission. It is an admission long overdue in American courts and legislatures. In part it has not occurred in American courts because common law traditions have been so modified for so long that they have been rendered in most instances unrecognisable. There is no specific commitment in American jurisprudence outside of certain constitutional rights to the 'values of justice and human rights' in disputes involving indigenous populations.

The Australian High Court does, however, cite two United States Indian law cases in building a case for recognising the Meriam people and their land claims and how sovereignty provides for Aboriginal land ownership upon recognition. First listed as authority is the *Passamaquoddy* case, previously discussed as a watershed dispute in the determination of indigenous collective identity under American law. Australia's High Court states that 'Sovereignty carries the power to create and to extinguish private rights and interest in land within the Sovereign's territory' (*Mabo* 1992: 65). Here the Court refers to note 6 in *Passamaquoddy*, a legal aside considering the concept of 'right to occupancy', as giving American Indian nations fee simple title to their lands. This concept gives legal credence to treaties and provides non-treaty indigenous nations with legal standing. It states, 'Indian title, also called `right to occupancy', refers to the Indian tribes' aboriginal title to land which predates the establishment of the United States. The right to extinguish Indian title is an attribute of sovereignty which no state [referring to the individual American states], but only the

United States [the federal government] can exercise; the Nonintercourse Act [the federal statute that restricts land cessions to treaty-making by Indians with the federal government only rather than with the states] giving statutory recognition to that fact.'

Australia's High Court next invokes *Tee-Hit-Ton Indians v. United States.* The Court notes that 'The sovereign power may or may not be exercised with solicitude for the welfare of Indigenous inhabitants but, in the case of common law countries, the courts cannot review the merits, as distinct from legality, of the exercise of sovereign power' (*Mabo* 1992: 72). In fact, the *Tee-Hit-Ton* decision turns on a particularly narrow interpretation of the Fifth Amendment to the U.S Constitution in preventing an Alaska Indian tribe from stopping the cutting of trees on land they claim as their homelands, and the Supreme Court reviewed the merits of the case. Although perhaps more analogous to the Australian situation, given the lack of treaties with Native Alaskans as well as with Aborigines, this case is not good law. In essence, it has been overruled by the Alaska Native Claims Settlement Act.

Of significance, however, is that the Australian High Court follows this discussion with a disclaimer, stating 'However, under a constitutional law of this country, the legality (and hence the validity) of an exercise of a sovereign power depends on the authority vested in the organ of government purporting to exercise its municipal constitutional law [and] determines the scope of authority to exercise a sovereign power over matters governed by municipal law, including rights and interests in land' (*Mabo* 1992: 72-73). The Court is basically stating that the right to recognise Aboriginal land claims is not vested in any other power than themselves unless pre-empted by parliamentary power, and it can do so based upon its 'skeleton of principle.' In the United States its highest court has abrogated this responsibility to Congress through the *Lone Wolf v. Hitchcock* (1903) decision nearly a century ago. Nevertheless, Australia's High Court has defined who and how such indigenous land actions may be

naintained, and in this process it provided for rudimentary forms of ecognition characteristics.

It has gone so far as to provide *Menominee Tribe*-like assurances. 'Native title', according to the High Court, 'was not extinguished by the creation of reserves nor by the mere appointment of ` trustees' to control a reserve where no grant of title was made' (*Mabo* 1992: 74). When the Menominees in the United States sought to preserve their treaty rights even though they had been terminated, the U.S. Supreme Court held that those rights superseded even termination legislation.

How then does the *Mabo* decision compare to American collective identity law? From Table I the *Mabo* decision can be inserted into all six categories. Requirements of racial, cultural, and temporal continuity are made in differing ways. Biological descent is in essence left with each Aboriginal nation. Cultural identity is stressed primarily in terms of tribal law and environmental relationships to the land. Time is viewed as important in terms of territory in that occupancy of traditional homelands is a mandatory aspect of recognition. Political structures are important because of the need to retain traditional law ways, but those structures are not mandated or defined beyond their relationships to culture. In essence, Australia's first attempt at recognition law is one that differs significantly from American attempts.

Conclusion

Indigenous identity, law, and history have a sordid past. It is as well to reiterate that each and every concept and issue raised here must be considered within colonial relationships. Post-colonial ideologies, so prevalent today in literary, historical, anthropological, and sociological writings, are simply not applicable. There is no such thing as a post-colonial

society in terms of indigenous legal identity external to indigenous peoples.

Since contact with non-Native nations, indigenous peoples have been in various degrees of colonial status at the same time the leadership of colonial societies have been in various forms of historical denial. Neither group can move beyond these colonial relationships until historical relationships have been understood and indigenous peoples achieve political and legal self-determination.[12] Robert K. Hitchcock explains the importance of one of these dual concepts in today's world. Reclaiming history 'is one of the most significant social movements world-wide in the late 20th century.' Writes Hitchcock, 'Everywhere, indigenous peoples are in the process of rediscovering aspects of themselves that had long been suppressed (1996: 84). Recapturing histories is not simply a question of reviving old ethnic identities; it is also about acknowledging the birth of new ones. . . .' Recognition of collective indigenous identities must include the old and the new to be true recognitions.

Within the context of the approaching twenty-first century, the historically harsh relationships of Native peoples and colonial societies are being mitigated by self-determination experiments in the United States, Australia, Canada, South Africa, New Zealand, and other world nations, but the colonial setting is still firm. A primary building block in that colonial setting, Native peoples argue, is flexible recognition law and the strengthening of collective indigenous identities so that greater indigenous control of their own governments and homelands can be ultimately attained (DePalma 1996).

Notes

I am particularly indebted to my colleagues at the University of Nebraska-Lincoln: David Wishart, Professor of Geography; Robert Hitchcock, Chair and Professor of Anthropology; and George Wolf, Associate Professor of English, for their interest in this project and for their very helpful references.

I am indebted to Lawrence Rosen (1989) for this phrase, which he uses to describe law and legal systems that '. . . must cope with defining as well as discovering facts.' 'Defining' in terms of colonial legal systems and indigenous identities requires the finding of facts previously ignored and a thorough sifting through those facts, something colonial legal systems are completely unprepared to handle.

Echo-Hawk 1997: 6-9. See also Corbett 1996. Robert K. Hitchcock (unpublished) has noted that 'Recent estimates suggest that over 40% of the people around the world do not enjoy basic civil liberties and human rights today. 1.2 billion people are poverty-stricken, and over 100 million people are enslaved. Indigenous peoples comprise one segment of the world's population that faces conditions that are especially stark . . . . [Indigenous peoples have suffered abuses that in many cases are more serious than those perpetrated upon most if not all other groups.] Some analysts argue that indigenous peoples are probably the single most disadvantaged set of populations in the world today.'

These conditions exist in the richest and poorest of world nations. For example, in Russia and Australia recent discussions have highlighted the poverty of remote Aboriginal communities in central Australia and the destruction of indigenous communities to the point of the near extinction of the Native peoples of Kamchatka (Farnsworth 1997, Specter 1997).

While Munganye was asserting his identity, Australia was oddly treated to several revelations of persons who were falsely asserting Aboriginal identities. There was the case of Wanda Koolmatrie, author of a supposedly Aboriginal autobiography, *My Own Sweet Time,* who turned out to really be Leon Carmen, a 47-year old white man living in Sydney. Then there was the award-winning supposedly Aboriginal painter Eddie Burrup from Kimberley who was really Elizabeth Durack, an 82-year-old white woman of Irish descent. The acting-director of the Kimberley Aboriginal Law and Cultural Center, Wayne Bergman, called the Durack revelation the 'ultimate act of colonization': *Omaha World-Herald*, March 9, 1997, 25A; March 14, 1997, p. 6.

[4] U.S., *Statutes at Large* 48 (June 18, 1934): 984-88 [*Indian Reorganization Act or Wheeler-Howard Act*]. For discussions on historical dimensions of this law, see Wunder 1994; Kelly 1975; Philp 1977.

Tribal governments were encouraged to define Indian membership via bloodlines, usually at 1/8 or higher quantum. Native nations who retained traditional governments, such as those of the Pueblos and Navajos, also adopted identity rules. The passage of the Indian Bill of Rights in 1968 was initially interpreted to undermine these definitions by holding them up against constitutional limits on the power of government over individuals. But the U.S. Supreme Court in *Santa Clara Pueblo v. Martinez* (1978) ended such erosions of tribal sovereignty over individual tribal membership identity. See Civil Rights Act of 1968 [also known as the *Indian Bill of Rights*], Titles II through VII, U.S., *Statutes at Large* 82 (April 11, 1968): 73-92; and Wunder 1994: 124-46.

[5] See also Nancy Oestreich Lurie (1972); Susan Hood(1972); Larry W. Burt (1986); and Donald L. Fixico (1986).

[6] This name literally means 'those of the place where pollock are plentiful.': Erickson 1978: 135.

[7] In general, state courts tried to denied tribes treaty rights while federal courts followed the lead of *Menominee Tribe*.

[8] In Australian literature, the themes of ties to the land and self-respect are strong aspects of Aboriginal identities. See Thea Astley 1993: 57-69.

[9] American legalists have determined the traditional homelands of various Native nations through the work of the Indian Claims Commission. This contrasts with Australia's efforts to set Aboriginal clan boundaries. The work has just begun. See Davis and Prescott 1992; and Davis 1994.

[10] According to Corbett 1996: 56-57, until *Mabo* there were 117 different definitions of an Aboriginal person in federal and state legislation.

Canada, unlike Australia, has rigidly codified indigenous identities to be reflected in treaties and the Indian Act of 1876. Olive Patricia Dickason,

Canadian legal and indigenous historian, has summarized the Canadian situation: 'The legal position of Amerindians in Canada is determined not only by the Indian Act but also by the constitution and the treaties. Despite the Canadian Charter of Rights and Freedoms, which in theory overrides all other statutes, the Indian Act continues to define Amerindian rights even as it reflects so little faith in the Indians'. Far from viewing Amerindians as equals, its goals of protection and assimilation have led to an emphasis on control rather than development' (Dickason 1992: 400).

[11] Identity requirements for the Saami in northern Russia, Finland, Sweden, and Norway, are much more stringent. One must be able to prove descent to the official Saami Registration Roll, speak a Saami language, and be recognized by the Saami community. There are dual colonial and indigenous government requirements (Corbett 1996: 53).

[12] Current issues for indigenous peoples within colonial constructs as reported in the American press include: assertions by Australian politicians such as Pauline Hanson that Aborigines are cannibals; the revelation by the 'Stolen Generations Report' that Aboriginal children were being taken from their parents and placed in white families or orphanages up to the 1970s; the marketing of Saamis in Finland on playing cards as mushroom eating drug addicts; and the demeaning of Maori culture in New Zealand through the manufacture of wax candle figurines of Maori chiefs with the wick protruding through the head. 'Cannibalism Claim Outrages Australian Aborigines,' *Omaha (Nebraska) World-Herald,* April 23, 1997; V. Joshi, 'Australian lawmaker likened to Hitler,' *Lincoln (Nebraska) Journal-Star,* May 9, 1997; J. George [Nunatsiaq News Correspondent], 'Sami Youth Protest Exploitation by Tourism Hucksters,' native-l@tamvm1.tamu.edu, December 13, 1996; 'Report: Forced adoption was ` genocide',' *Lincoln (Nebraska) Journal-Star,* May 21, 1997; C. Farnsworth, 'Facing Pain of Aborigines Wrested From Families, Many Australians Shrug,' *New York Times,* June 8, 1997.

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